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In the

Supreme Court of the United States.

OCTOBER TERM, 1941.

JAMES A. HERBERT, TRUSTEE,
Petitioner,
v.
WILLIAM F. SULLIVAN ET AL.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Opinions Below.

The opinion of the District Court of the United States for the District of New Hampshire by Morris, J., was handed down February 24, 1941 (R. 7). An amended opinion was filed March 17, 1941 (R. 12). The judgment of the District Court was entered March 25, 1941 (R. 16). This opinion is reported in 37 Fed. Supp. 468 (1941).

The opinion of the United States Circuit Court of Appeals for the First Circuit was handed down November 14, 1941 (R. 41), and is reported in F. (2d) (1941).

Jurisdiction.

The date of the judgment to be reviewed is November 14, 1941 (R. 45).

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code (28 U.S.C. 347(a), as amended February 13, 1925, chap. 229, sec. 1, 43 Stat. 938).

Statutes Involved.

The statute involved is Section 34 of the Federal Judiciary Act of September 24, 1789 (1 Stat. at L. 73, 92, chap. 20, 28 U.S.C. sec. 725), which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Summary Statement of Matter Involved.

This is an appeal by the duly appointed and qualified trustee in bankruptcy (R. 17) of the Commercial Brewing Company, a corporation organized under the laws of Massachusetts (R. 2), from judgments for the respondents entered March 25, 1941 (R. 16), in the District Court of the United States for the District of New Hampshire, by order of Morris, J., in accordance with his opinions of February 24, 1941 (R. 7), and March 17, 1941 (R. 12) (37 Fed. Supp. 46[illegible]), and affirmed by the United States Circuit Court of Appeals for the First Circuit, November 14, 1941 (R. 41) (F. (2d) , 1941).

The petitioner as trustee in the courts below sought to hold the respondents individually liable on a promissory

negotiable instrument (R. 3). The respondents are residents of Nashua in the State of New Hampshire and are the executors of the Estate of John D. Sullivan, late of that city (R. 19). The petitioner is a resident of Massachusetts (R. 7).

Jurisdiction is based upon diversity of citizenship and an amount in controversy in excess of $3000.

The note upon which this action was brought reads as follows (R. 3):

"$5,000.00—

Nashua, New Hampshire.
Oct. 31, 1935.

On demand after date I promise to pay to the order of the Commercial Brewing Company, of Charlestown, Massachusetts, Five Thousand and no/100 Dollars payable at its office with interest at five per cent per annum value received. Secured by collateral one hundred shares Commercial Brewing Company stock.

William F. Sullivan
Mary J. Cody
Ellen M. McMurrer.
Executors of the Will of
John D. Sullivan."

The $5000 received for this note was used by the respondents to pay bills of the estate (R. 24). No part of it has ever been repaid, and no interest has ever been paid on it (R. 29). Demand, which was duly made by the petitioner herein on August 27, 1940 (R. 25), was not complied with by the respondents (R. 29). This suit against the respondents individually was brought on November 6, 1940 (R. 2). The stock pledged as collateral is now valueless (R. 29).

The respondents, as executors, were not authorized by the will, nor by license of the New Hampshire Probate

Court, to borrow money or to pledge stock (R. 19). The negotiations for the loan were carried on in Massachusetts (R. 21). The note was executed in Nashua, New Hampshire, and was payable at the office of the Commercial Brewing Company in Massachusetts (R. 21).

Acting pursuant to a suggestion contained in a letter to counsel written by Morris, J. (R. 4), after the close of the evidence in the District Court, respondents amended their answer by adding thereto the defense "that the contract or agreement set forth in the Plaintiff's complaint is *ultra vires* the Plaintiff corporation . . ." (R. 7).

The trial court based its finding for the respondents in part upon this defense of *ultra vires* (R. 15). The Circuit Court based its affirmance of the judgment entirely upon this defense (R. 41). It is not disputed that the Commercial Brewing Company had no power under its charter to make loans of money (R. 43).

Specification of Error.

The Circuit Court of Appeals erred:

(1) In holding that the petitioner cannot recover on the note under Massachusetts law;

(2) In its application of Section 34 of the Federal Judiciary Act of September 24, 1789 (1 Stat. at L. 73, 92, chap. 20, 28 U.S.C. sec. 725).

Questions Presented.

The questions here to be presented are:

(1) Does the law of Massachusetts require a finding for respondents in a suit on a note, for which note the corporation had paid respondents $5000, because the loaning of money was *ultra vires* the corporation?

(2) What is the duty of a Federal court in seeking the "rule of decision" as required by Section 34 of the Federal Judiciary Act of September 24, 1789, in a case where there are no decisions squarely in point by any State court in the State involved?

Should a Federal court be permitted to anticipate what a Massachusetts court would hold where there are no controlling decisions, in the manner the majority of the Circuit Court of Appeals in the case at bar apparently attempted? Or should the Federal court be free to apply its independent judgment in order not to extend an undesirable rule beyond the clear holdings of decided Massachusetts cases as the dissenting Justice of the Circuit Court in the case at bar apparently contended?

Reasons for Granting the Writ.

The Circuit Court has decided an important question of local law in a way in conflict with applicable local decisions. While no cases exactly in point have been decided by any court in Massachusetts, those cases which have been decided clearly indicate that the Massachusetts courts, if presented with the situation involved in the case at bar, would have reached a result contrary to the Circuit Court decision. This is made even more clear by an examination of most recent trends in the doctrine of *ultra vires* throughout the country.

The members of the Circuit Court have split on an important question of Federal law which has not been, but should be, settled by the Supreme Court. Section 34 of the Judiciary Act of September 24, 1789, has of late been reexamined by this Court in a series of opinions commencing with *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). While many of the problems raised by that opinion have been settled by this Court in its later opinions, the question in-

volved in this case is as yet unsettled. This Court has pointed out the great public importance involved in the relationship of the Federal and State courts. In the situation of the case at bar no clear rule has been laid down as to the solution of the dilemma in the application of State law in a situation where there is no direct holding by any State court on the question involved. That dilemma led to a division among the justices of the Circuit Court in the case at bar. That dilemma has split the Circuit Courts of Appeals throughout the country in their efforts to achieve a guiding principle. The ramifications of this division are apparent upon comparison of the following cases: *New York Life Insurance Company* v. *Jackson* (C.C.A. 7th, 1938), 98 F. (2d) 950, writ of *cert. den'd,* 305 U.S. 640 (1938); *Travelers Indemnity Co.* v. *Plymouth Box & Panel Company* (C.C.A. 4th, 1938), 99 F. (2d) 218; *Cass Bank and Trust Company* v. *Sheehan* (C.C.A. 8th, 1938), 97 F. (2d) 935; *Hagan & Company* v. *The Washington Water Power Company* (C.C.A. 7th, 1938), 99 F. (2d) 614; *Sampson* v. *Welch,* D.C. (1938), 23 Fed. Supp. 271.

It is of paramount importance that this Court resolve the dilemma and announce a principle of general application. The case at bar furnishes an excellent vehicle to this Court for this purpose in view of the fact that the members of the Circuit Court differed on this precise point.

Prayer for Writ.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the First Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the First Circuit, had in the

case numbered and entitled on its docket, No. 3693, *James A. Herbert, Trustee, Plaintiff, Appellant,* v. *William F. Sullivan et al., Defendants, Appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the First Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

JAMES A. HERBERT,
Pro Se.

Dated December 23, 1941.